MARK IGNATIUS UTTLEY

v.

WONG KAM HOR & ANOR

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL SUIT NO: 22-369-1999]
11 SEPTEMBER 2002

TORT: *Defamation - Libel - Professional musician - Allegations as to competency and credentials - Allegations that plaintiff had assaulted students and evaded tax - Whether defamatory - Defence of qualified privilege and fair comment - Whether not available - Libellous facts - Whether could not form basis of fair comment - Damages - Quantum - Defamation Act 1957, s. 9 - Rules of High Court 1980, O. 78 r. 3(2)*

The plaintiff, a professional musician, was appointed by the State Government of Penang as resident conductor for the State's orchestra group called Penang State Symphony Orchestra and Chorus ('PESSOC'). After the appointment, questions were raised in the State Legislative Assembly as to the plaintiff's credentials, and press statements in respect thereof were made by two members of the Assembly. Subsequently, on 24 June 1998, the defendants published an article in their newspaper entitled "British Conductor's Academic Qualification Questioned", reproducing in effect the text of the press statement that was hostile to the plaintiff. The facts showed that the article, apart from questioning the plaintiff's competency and integrity, had also posed the following questions to the readers, namely: (i) is a person who holds a general degree in music and a diploma in violin qualified to be a conductor? (ii) is Mark Ostyn qualified to teach other musical instruments besides violin? (iii) How many years of experience does Mark Ostyn have in conducting? What types of orchestras has he conducted before? Does he have experience in training young musicians? (iv) why did Kee Phaik Cheen extend Mark Ostyn's agreement in the face of the economic depressions and parental complaints? and (v) Is it true that the Inland Revenue Board is after Mark Ostyn for RM136,000 in income tax? The plaintiff alleged that the article had brought his credit and reputation into public scandal, odium and contempt, and in the circumstances sued the defendants *inter alia* for damages for defamation. The defendants denied that the article was defamatory, and in any case pleaded qualified privilege and fair comment.

Held:

[1] To establish a case in defamation the plaintiff must identify and show the natural and ordinary meaning of the words as understood by a member of the public. However, in construing the natural ordinary meaning to be given to the impugned words, the court is at liberty to consider innuendos namely whether an insinuation or an inference could be drawn from the words used. (p 636 g-h)

[2] There is no doubt that a reasonable person reading the impugned heading and the article would conclude that the plaintiff did not have the qualification or experience that he claimed he had, that he had obtained his appointment of resident conductor by false cheating or pretences and that he was not fit to hold the post. Further, the rhetorical questions juxtaposed at the end of the statement would make it clear that the plaintiff was not qualified to be a conductor of PESSOC or to teach other musical instruments besides violin, that he had no experience in training young musicians, that he had assaulted students, that he was giving lessons illegally and that he was evading tax and was hence a dishonest person. (p 639 c-e)

[3] Clearly, an allegation that the plaintiff was guilty of tax evasion is defamatory. Likewise, the allegation that the plaintiff lacked the qualification for the post of resident conductor, that he had obtained the appointment by false pretences, that he was a dishonest person who assaulted his student and ought to be investigated by the authorities, that he was giving music lessons illegally and was a tax evader, were all defamatory of the plaintiff. Doubtless, the implications were severe enough as to affect the plaintiff in his profession. (pp 638 d-e & 640 a)

[4] In order to be privileged the publication must be in the public interest. However, there is a real and a very important distinction between 'that which the public is interested in' and 'that which is in the public interest'. On the facts of this case, the defence of qualified privilege must fail. The nature of the information was such that it only concerned a narrow section of the public involved with PESSOC, namely the students and their parents. The information was not of concern to the general public. (p 641 b)

[4a] It is obvious that the second defendant, being a Chinese daily, was ready to present to the Chinese readers the clash of opinions between the sole DAP opposition State Assemblywoman and the State Government's EXCO member. To the second defendant, the issue, namely the subject

of the plaintiff's conduct and qualification, was the allurement that drew the various press conferences that generated news 'that which the public is interested in' and not 'that which is in the public interest'. Knowing the background of these two political parties and especially in the State of Penang, the public debate was news that would generate sales of the defendant's newspaper. It ought also to be noted that throughout the verbal sparring of the two political opponents, the plaintiff had paid scant attention to the need to obtain the plaintiff's opinion or views, notwithstanding that it was the plaintiff who was the subject of vilification in the newspaper. Surely it would have been prudent for them to have at least sought the plaintiff's explanation on the matter. (pp 641 g-h & 642 a)

[5] In order to succeed in the defence of fair comment, the defendants must show what were the words in the impugned article that constituted comments and those that were facts. The defendants must also prove the facts on which the comments were made. This the defendants had failed to do, and the defence of fair comment is not therefore available to them. The defendants had also failed to comply with the requirements of O. 78 r. 3(2) of the RHC 1980. Besides, the defendants had never verified the truth or otherwise of Chong Eng's statement, and that being so, they cannot now avail themselves of the defence of fair comment. (pp 645 f & 646 c-f)

[6] Bearing in mind the fact that the defendants had refused to take any step to remedy the damage caused to the plaintiff's reputation, and the authority of *Abdul Khalid Bakar Shah v. Parti Islam Se Malaysia & Ors*, an award of RM200,000 is a fair sum to be awarded to the plaintiff. This aside, injunction must also issue to restrain the defendants from further publishing the libel upon the plaintiff. (p 647 f)

[Judgment for plaintiff.]

Case(s) referred to:

Abdul Khalid Bakar Shah v. Party Islam Se Malaysia & Ors [2001] 4 CLJ 15 HC ***(refd)***

DP Vijandran v. Karpal Singh & Ors [2000] 6 CLJ 433 HC ***(foll)***

English & Scottish Co-operative Investment Mortgage and Investment Society Ltd v. Odhams Press Ltd [1941] KB 440 ***(refd)***

Karpal Singh Ram Singh v. DP Vijandran [2001] 3 CLJ 871 CA ***(refd)***

Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC ***(refd)***

Reynolds v. Times Newspaper Ltd & Ors [1999] 4 All ER HL ***(refd)***

Tjanting Handicraft Sdn Bhd v. Utusan Melayu (M) Bhd [2001] 3 CLJ 571 HC ***(foll)***

Legislation referred to:
Defamation Act 1957, s. 9
Penal Code, s. 420
Rules of the High Court 1980, O. 78 r. 3(2)

For the plaintiff - P Navaratnam (R Subramaniam); M/s Nava, Subra & Co
For the defendants - JA Yeoh (Harminder Kaur); M/s Shearn Delamore & Co
Jagdeep Singh watching brief for Chong Eng; M/s Karpal Singh & Co

Reported by WA Sharif

JUDGMENT

RK Nathan J:

Facts

The plaintiff was at the material time of the publication of the impugned article the resident conductor of the Penang State Symphony Orchestra and Chorus (PESSOC). The 1st defendant was at the material time the editor of the Nanyang Siang Pau, a Chinese Newsdaily, and the 2nd defendant, the publisher and printer of the said Nanyang Siang Pau. On 10 June 1998, Chong Eng, the then sole DAP State Assemblywoman for Batu Lancang, Penang, had in her adjournment speech in the Penang State Assembly raised, for the consideration of Kee Phaik Cheen (Kee), the Chairman of the PESSOC Committee and also the State Assemblywoman for Batu Uban and an Exco Member responsible for PESSOC, various matters concerning the academic qualifications and conduct of the plaintiff. In her adjournment speech, Chong Eng had drawn the attention of the assembly to a brochure entitled "Highlights of PESSOC Programs" which described the plaintiff as having a degree from Leeds University and diplomas from the Royal College and Trinity College and as having studied conducting music at York University whereas Leeds University had confirmed that the plaintiff had never studied in Leeds University, whilst York University had said that the plaintiff quit the university after studying for three months, in a masters degree course in musical performance.

On 12 June 1998, Chong Eng had called for a press conference where she had disclosed, amongst other things, an e-mail from Leeds University which stated that there was no record that the plaintiff was ever in Leeds University.

On 16 June 1998, Kee had issued a press statement alleging, amongst other things, that Chong Eng had misled the State Assembly into questioning the academic qualifications of the plaintiff as conductor of PESSOC and challenged Chong Eng to prove that the plaintiff did not have the degree of Bachelor of Education in Music.

On 21 June 1998, Chong Eng had, in reply to the press statement issued by Kee on 16 June 1998, issued a press statement addressing, amongst other things, how the qualifications of the plaintiff came to be questioned in the State Assembly.

In the press statement released on 21 June 1998, Chong Eng had also, in stating that PESSOC received funding from the State Government, posed certain questions to Kee who, being the State Exco Member responsible for PESSOC, was, according to Chong Eng, obliged to answer.

On 24 June 1998, the 2nd defendant published a report on the press statement of Chong Eng issued on 21 June 1998 in the Chinese newsdaily Nanyang Siang Pau. The report under the heading 'British conductor's academic qualification questioned' reproduced essentially the text of the said press statement including the series of questions pertaining to the plaintiff, posed by Chong Eng to Kee as the State Exco-Member directly responsible for PESSOC. The impugned portions of the reporting, the subject matter of this case is reproduced from para. 4 of of the statement of claim. It reads as follows:

British Conductor's Academic Qualification Questioned. Chong Eng: Kee Phaik Cheen Is Negligent

(i) (Penang 23rd) Penang State's sole opposition state assemblywoman Chong Eng today said that Kee Phaik Cheen was negligent in the State Assembly Hall, causing the British conductor's academic qualification being questioned.

(ii) In my adjournment speech in the Assembly, I urged PESSOC Committee Chairman cum State Assemblyman to verify the academic qualifications of the expatriate conductor to be correct because Kee Phaik Cheen is the Exco-member directly responsible in hiring him.

(iii) The Leeds University e-mail reads: I have checked records in the University but could not find the record/s that Mark Ostyn or Mark Ignatius Uttley was ever in Leeds University. The facsimile from York University Music Department says: Mark Uttley quit after studying three months in a master degree course in Musical Performance.

(iv) She at the material time had a photocopy of Mark Ostyn's diploma; but she was unable to reply at all why Leeds University could not find the record about Mark Ostyn. Neither was she able to prove Mark Ostyn ever studied conducting in York University.

(v) As she was unable to explain why Leeds University did not have Mark Ostyn's record and also unable to prove that Mark Ostyn ever studied conducting in York University, her negligence has led to Mark Ostyn's degree being questioned.

(vi) Is a person who holds a general degree in music and a diploma in violin qualified to be a conductor?

(vii) Is Mark Ostyn qualified to teach other musical instruments besides violin?

(viii) How many years of experience does Mark Ostyn have in conducting? What types of orchestras has he conducted before? Does he have experience in training young musicians?

(ix) Can Kee Phaik Cheen tell the people of Penang what form of investigation has she carried out on parental complaints that Mark Ostyn assaulted students?

(x) Since Mark Ostyn is an employed full-time conductor, is he entitled to give lessons for a fee (at the rate of RM60-70 per hour)? Is he required to apply to authorities for a separate permit to do this or has Kee Phaik Cheen the authority to grant such a permit?

(xi) Why did Kee Phaik Cheen extend Mark Ostyn's agreement in the face of the economic depression and parental complaints?

(xii) Is it true that the Inland Revenue Board is after Mark Ostyn for RM136,000.00 in income tax?

Plaintiff's Case

The plaintiff had in the statement of claim reproduced parts of the text of the impugned article as the basis for his claim that his credit and reputation had been brought into public scandal, odium and contempt. The plaintiff claimed that the words in the impugned article as set out in para. 4 of the statement of claim were defamatory of the plaintiff in that the words in their natural and ordinary meaning meant and were understood to mean that 'the plaintiff had no qualifications and no experience to be the conductor of PESSOC, that he had obtained the appointment by false pretences and/or cheating, that he was a dishonest person who assaulted his students and ought to be investigated by the authorities, that he was giving lessons in musical instruments in which he was not qualified, that he had no permit to do so, and that he was a tax-evader.

The thrust of the plaintiff's evidence was that the impugned article had alleged that his qualifications were dubious and had cast serious doubts in the public mind on his competence and integrity as an established plaintiff had no qualifications and no experience to be the conductor of PESSOC, that he had obtained the appointment by false pretences and/or cheating, that he was a dishonest person who assaulted his students and ought to be investigated by the authorities, that he was giving lessons in musical instruments in which he was not qualified, that he had no permit to do so, and that he was a tax-evader.

The thrust of the plaintiff's evidence was that the impugned article had alleged that his qualifications were dubious and had cast serious doubts in the public mind on his competence and integrity as an established professional musician and as a result the public had assumed that he had forged or falsified his documents. The plaintiff therefore prayed for:

(i) Damages, including aggravated and exemplary damages.

(ii) An injunction restraining the 1st defendant by himself, his servants or agents or otherwise and the 2nd defendant by its directors, its servants or agents or otherwise from further publishing the said or any similar libel upon the plaintiff.

(iii) Interest.

(iv) Costs.

(v) Further or other relief.

The Defence

The defendants denied that the said words as translated could be understood to have any of the defamatory meanings the plaintiff had alluded to in the statement of claim. Stating that it was a report of matters of public interest the defendants claimed that the publication was on an occasion of qualified privilege. Alternatively, it was the defence that in so far as the said report contained comments or expressions of opinion relating to the plaintiff's academic qualification, his experience in conducting orchestras, his eligibility to give private lessons, the extension of his contract of employment, complaints from parents on the assault on the students and the enquiry on the part of the Inland Revenue Board into the plaintiff's tax affairs, such comments or expressions of opinion constituted fair comment on a matter of public interest namely, the propriety or otherwise of the State Government's appointment of the plaintiff as a conductor of PESSOC and the propriety or otherwise of the conduct of the plaintiff as an employee of the State Government. The defendants also relied on s. 9 of the Defamation Act 1957.

Findings Of The Court

In the light of the defence of qualified privilege and fair comment, I directed the defence to commence the case.

It is in evidence that Chong Eng sent an e-mail on 28 May 1998 to Leeds University for confirmation as regards the plaintiff's academic qualifications. On 29 May 1998, Leeds University replied by e-mail which reads as follows:

> I have checked the University records for a person of the name of Mark Ignatius Uttley or Mark Ostyn and can find no trace of a person of this name ever having been at the University of Leeds.
>
> If you could give some further information I will of course look further, but I need to know what year he was at the University, when he graduated, what subject in, or any more details that would help in tracing a person who was not at the University.

Chong Eng did not send the further information requested by the university but was content to rely on the first para of the said e-mail, which stated that there was no trace of any person with the plaintiff's name, having been at the university. The plaintiff testified that Chong Eng produced the said e-mail in the State Assembly on 10 June 1998 in order to rebut the plaintiff's assertions that he had a degree in Bachelor of Education from Leeds University.

On 11 June 1998 one Sharon Cheah, a reporter with The Star sent an e-mail to Leeds University. In that e-mail Sharon Cheah supplied the further information that the plaintiff had graduated with a Bachelor of Arts in Education majoring in Music and that he was there from 1978-1982. Within a matter of hours, the university sent an e-mail to Chong Eng, with the information that the plaintiff had gone to Leeds Polytechnic School of Education and that he was awarded an ordinary degree of Bachelor of Education in Music in September 1982. Sharon Cheah was also informed of this by a separate e-mail.

On the following day Chong Eng called a press conference in which she informed the press about the e-mail which she had received from Leeds University on the previous day and urged the State Government to take the necessary action, once it had verified Mark Ostyn's credentials. She also took Kee to task and said that she should be accountable to the people.

The PESSOC Technical Committee, at a meeting held on 14 June 1998 passed a resolution in which it stated that the plaintiff's qualifications having been freshly certified by the validation office of Leeds University, this had therefore provided conclusive proof that the qualifications presented by the plaintiff were genuine and that Chong Eng in releasing her views publicly without foundation had cast serious doubts in the minds of the public upon the competency and integrity of the plaintiff as an established professional musician. A copy of this resolution was released to the press and a copy was also sent to the Chief Minister.

The plaintiff then made a press statement on 16 June 1998. In it the plaintiff stated that although he found the majority of Malaysians extremely friendly and welcoming and that he had found the work in Malaysia both challenging

and rewarding, there seemed to be a group of people who strongly resented his presence for reasons unknown to him. He also went on to ask why his qualifications were not verified earlier before it was raised in the State Assembly, especially since it had only taken him two hours to obtain a faxed verification from Leeds University.

Kee in her press statement of 16 June 1998 challenged Chong Eng to prove that the plaintiff's qualifications were not genuine and that if she was unable to do so, she should make a public apology for the false allegation and also explain to the public as to how she was able to come to a false conclusion in the first instance. In response, Chong Eng issued a lengthy press statement on 21 June 1998 in which she blamed Kee for what had taken place in the State Assembly. It is necessary to quote a relevant passage from the text. It reads as follows:

> If Dato' Kee had done her homework she would be able to answer my inquiries in the State Assembly. But because she was not able to explain why Leeds University can find no trace of a person of this name ever having been at the University of Leeds and also unable to verify that Mark Ostyn 'studied conducting at York University' she herself created doubt on Mark Ostyn's qualification. She is the one throwing sand into a person's rice bowl. Thus it is Dato' Kee that should make a full public apology for not performing her duties in the State Assembly.

Kee had said that she had not received prior notice from Chong Eng before she raised querries about the plaintiff's qualifications. The plaintiff argued that Chong Eng knew that Leeds University could not trace the plaintiff's name because she, Chong Eng, had not supplied the further information sought by the University.

The defendants then published the impugned article in the issue of Nanyang Siang Pau on 24 June 1998. The impugned article was taken almost word for word from the press statement of Chong Eng.

Are The Said Words Defamatory Of The Plaintiff

To establish a case in defamation relating to the words complained of, the plaintiff must show what the ordinary and reasonable man in the street would construe the words used as such. The plaintiff must identify and show the natural and ordinary meaning of the words as understood by a member of the public. In construing the natural and ordinary meaning to be given to the impugned words the court is at liberty to consider innuendos namely whether an insinuation or an inference could be drawn from the words used.

In *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 CLJ 583; ([1990] 3 CLJ (Rep) 691) Thean J stated at p. 595 (at p. 705) as follows:

> The issue is one purely of construction of the words, but the rules of construction applicable in construing a contract or a will are not appropriate for the purpose. The proper approach is to consider what meaning the words would convey to ordinary reasonable persons using their general knowledge and common sense. Such meaning is not confined to a literal or strict meaning of the words but includes any inferences or implications which could reasonably be drawn by such persons: see para. 4.04 of Duncan and Neill on *Defamation,* (2nd edn). In construing the natural and ordinary meaning of words, broad principles have been authoritatively laid down. Lord Reid in *Rubber Improvement Ltd v. Daily Telegraph Ltd* [1964] AC 234 at p. 258 said:
>
> > The ordinary man does not live in an ivory tower and he is not inhibited by a knowledge of the rules of construction. So he can and does read between the lines in the light of his general knowledge and experience of worldly affairs ...
> >
> > What the ordinary man would infer without special knowledge has generally been called the natural and ordinary meaning of the words. But that expression is rather misleading in that it conceals the fact that there are two elements in it. Sometimes it is not necessary to go beyond the words themselves, as where the Plaintiff has been called a thief or a murderer. But more often the sting is not so much in the words themselves as in what the ordinary man will infer from them, and that is also regarded as part of their natural and ordinary meaning.

In the same case, Lord Devlin at the commencement of his speech, at p. 277, said:

> My Lords, the natural and ordinary meaning of words ought in theory to be the same for the lawyer as for the layman, because the lawyer's first rule of construction is that words are to be given their natural and ordinary meaning as popularly understood. The proposition that ordinary words are the same for the lawyer as for the layman is as a matter of pure construction undoubtedly true. But it is very difficult to draw the line between pure construction and implication, and the layman's capacity for implication is much greater than the lawyer's. The lawyer's rule is that the implication must be necessary as well as reasonable. The layman reads in an implication much more freely; and unfortunately, as the law of defamation has to take into account, is especially prone to do so when it is derogatory.

The words complained of in para. 4 of the statement of claim must be read in the context of the whole article. An ordinary reader upon reading the heading would have noted that the British conductor's (the plaintiff's) academic qualifications were being questioned ie, that it was not what it had been represented to be and that Chong Eng had alleged that Kee was negligent in not properly verifying the plaintiff's academic qualifications.

It would seem that after reading the impugned article and the heading, a reasonable reader would have inferred that the plaintiff in fact did not have all the qualifications that he had represented that he had, in order to obtain the post of resident conductor. The reader would discern that, although Kee and Chong Eng were making allegations against each other, the real sting of the article was directed against the plaintiff and his fitness for the post of resident conductor. Even if there were any lingering doubts in the mind of the reader, they would be dispelled by the questions posed at the end of the article, which were directed at the plaintiff and his alleged lack of qualifications and other misconduct.

The question "Is a person who holds a general degree in music and a diploma in violin qualified to be a conductor?" might in any other context pass off as an innocent question, but in the context of the impugned article, this was clearly a rhetorical question which carried its own answer in that such a person as the plaintiff, was not qualified to be a conductor.

The next question "Is Mark Ostyn qualified to teach other musical instruments besides violin?" was clearly meant to suggest to the reasonable reader, that the plaintiff was not qualified to teach other musical instruments besides violin.

The questions "How many years of experience does Mark Ostyn have in conducting? What types of orchestras has he conducted before? Does he have experience in training young musicians?" would no doubt give the impression to a reasonable reader that the plaintiff had little or no experience in conducting orchestras and in training young musicians.

The next question "Can Kee Phaik Cheen tell the people of Penang what form of investigations has she carried out on parental complaints that Mark Ostyn assaulted students?" would no doubt give the inference that the plaintiff had assaulted his students and that despite complaints from the parents, no investigations had been carried out.

The subsequent questions "Since Mark Ostyn is an employed full-time conductor, is he entitled to give lessons for a fee (at the rate of RM60 to 70 per hour)? Is he required to apply to the authorities for a separate permit to do this or has Kee Phaik Cheen the authority to grant such a permit?" would

no doubt give the impression that the plaintiff was making money illegally, without the knowledge and/or sanction of the authorities, although as a full-time conductor, he was not entitled to do so.

The next question "Why did Kee Phaik Cheen extend Mark Ostyn's agreement in the face of economic depression and parental complaints?" would no doubt kindle the mind of the public to wonder why the plaintiff's contract was renewed in the face of parental complaints that the plaintiff had assaulted his students.

The final question "Is it true that the Inland Revenue Board is after Mark Ostyn for RM136,000 in income tax?" would lead a reasonable reader to infer that the plaintiff was evading income tax to the tune of RM136,000.

There is no doubt in my mind that a reasonable person reading the impugned heading and the article would conclude that the plaintiff did not have the qualification and/or experience that he claimed he had, that he had obtained the appointment of resident conductor by false pretences and/or by cheating and that he was therefore not fit to hold the post of conductor. Further the rhetorical questions clearly juxtapositioned at the end of the statement would, needless to say make it clear that the plaintiff was not qualified to be a conductor of PESSOC, to teach other musical instruments besides violin, that he had no experience in training young musicians, that he had assaulted students, that he was giving lessons illegally from which he raked in a large income without having declared such earnings to the Inland Revenue Board and that in consequence thereof he was evading tax and was therefore a dishonest person. Whether a particular meaning is capable of being defamatory is a question of law. Whether the meaning is actually defamatory is a question of fact.

Whether the impugned words bear the meaning given by the plaintiff is to be determined by applying the objective test which is how the words would be understood by the general public. Therefore, the court is not concerned with the meaning the defendants intended to convey for this purpose. Another factor the court must consider is the circumstances and the manner of the publication. Where an issue is raised in the newspapers or in Parliament or at a State Assembly the court must assume that the matter is one of significance and is therefore more likely than not to convey a defamatory meaning to the ordinary reader. (See *English & Scottish Co-operative Investment Mortgage and Investment Society Ltd v. Odhams Press Ltd* [1941] KB 440.)

As to whether the said meaning is defamatory the test is to see if such words tend to make reasonable people think the worse of the plaintiff or whether such words would cause him to be shunned or avoided. There is no requirement of the plaintiff to show that any of the readers actually thought the worse of him.

Clearly therefore an allegation that the plaintiff has been guilty of tax evasion would be defamatory. I also hold the view that the allegation levied against the plaintiff that he lacked the qualification for the post of resident conductor, that he had obtained the appointment by false pretences and/or cheating, that he was a dishonest person who assaulted his students and ought to be investigated by the authorities, that he was giving music lessons illegally and was a tax evader, were all defamatory of the plaintiff.

When words tend to affect a person in his office, profession or trade, such words must impute to the plaintiff some attribute, the absence of which would be necessary to ensure his success or the presence of some attribute which would be detrimental towards his success. Here the implications are severe enough to affect the plaintiff in his profession. He had been maligned as having lack of integrity.

The Defence Of Qualified Privilege

The defence of qualified privilege is no doubt available to the defendants if they fall within the accepted principles. No doubt it is set law that in order to be privileged the publication must be in the public interest. The question is, whether the public was entitled to know the particular information.

In considering this defence it is appropriate to refer to my decision in *DP Vijandran v. Karpal Singh & Ors.* [2000] 6 CLJ 433.

In that case the 1st defendant was awarded costs against the plaintiff in respect of some other case. The plaintiff had himself been charged for a criminal offence and as a result the Bar Council had refused to issue him a Practicing Certificate to enable him to practice. The plaintiff therefore had to close his law office. The plaintiff had operated two clients' accounts, one with Bank Buruh and the other with Bank of Commerce. He had closed the Bank Buruh account and was operating the Bank of Commerce account. By inadvertence the plaintiff sent the 1st defendant a cheque in full settlement of the taxed costs from the Bank Buruh account that had been closed. As soon as both Bank Buruh and the 1st defendant's clerk had informed him of the error the plaintiff issued a fresh cheque for the full sum from the Bank of Commerce account. In the meantime the 1st defendant issued a press statement *inter alia* alleging that the plaintiff's conduct in issuing a cheque which was dishonoured amounted to a serious offence of cheating under s. 420 of the Penal Code and that the plaintiff's conduct was dishonourable and had rendered him unfit to be on the rolls of advocates and solicitors in the country and that the country could ill-afford to have the plaintiff in the Legal Profession. The 2nd defendant, the publisher and owner of The Star newspaper and the 3rd defendant, the publisher and owner of the "New Straits Times," the leading English dailies in the country

with a large circulation published the contents of the press statement of the 1st defendant. The plaintiff contended that the conduct of all the defendants had gravely injured him in his professional standing, character, credit and reputation and that he had been brought into public scandal, odium and contempt and sued *inter alia* for damages for libel.

Having heard full arguments I said at pp. 452-453 as follows:

> To my mind, the second defendant has fallen prey to a popular fallacy. It has failed to appreciate the fact that there is a real and a very important distinction between 'that which the public is interested in' and 'that which is in the public interest'.
>
> Needless to say the first panders to the draw of the public and certainly the courts would not lend their protection to such exercises. The second caters for that which is for the benefit of the public and the courts would certainly extend their protection. This subtle yet subsisting distinction is found in s. 12(3) of the Defamation Act 1957, which reads as follows:
>
> (3) Nothing in this section shall be construed as protecting the publication of any blasphemous, seditious or indecent matter or of any matter which is not of public concern and the publication of which is not for the public benefit.
>
> Clearly from the pleadings the second defendant intended to pander to the taste of the public as the defence suggests that the public would be interested in the dispute between the plaintiff and the first defendant. The second defendant is thus precluded now from raising the concept of public interest to support its defence of qualified privilege. I am satisfied that the plaintiff has indeed proved his case against the second defendant.

The Court of Appeal upheld the judgment on the issue of liability but allowed the appeal on quantum. (See *Karpal Singh a/l Ram Singh v. DP Vijandran* [2001] 3 CLJ 871 CA.)

With respect I am of the view that the conduct of the defendants in this case would clearly elicit the same quotation as cited above. It is obvious that the 2nd defendant being a Chinese daily was ready to present to the Chinese readers the clash of opinions between the sole DAP opposition State Assemblywoman and the State Government's Exco member. To the 2nd defendant this issue, namely the subject of the plaintiff's conduct and qualification, was the allurement that drew the various press conferences that generated news 'that which the public is interested in' and not 'that which is in the public interest'. Knowing the background of these two political parties and especially in the State of Penang this public debate between Chong Eng and Kee was news that would generate sales of the defendant's newspapers.

There is yet another reason in my view why the defence of qualified privilege must fail. Whilst the defendants were busy reporting the verbal sparring of the two political opponents, they paid scant attention to the need to obtain the plaintiff's opinion or views in the matter, since the plaintiff himself was the subject of vilification in the newspapers by the defendants. When reporting the innuendoes thrown by Chong Eng against the plaintiff, there is no mention at all of the plaintiff's own explanation. Surely it would have been prudent for the defendants to have at least sought the plaintiff's explanation on the matter. But as I said, if the defendants had done that, sensationalism would have ended and there would have been nothing else to write to catch the readers' interest and imagination. In *Reynolds v. Times Newspaper Ltd & Others* [1999] 4 All ER HL, Lord Nicholls had this to say at p. 627 on the need to get the plaintiff's version in respect of the allegations:

> ... A most telling criticism of the article is the failure to mention Mr Reynolds' own explanation to the Dail. Mr. Ruddock omitted this from the article because he rejected Mr Reynolds' version of the events and concluded that Mr Reynolds had been deliberately misleading. It goes without saying that a journalist is entitled and bound to reach his own conclusions and to express them honestly and fearlessly. He is entitled to disbelieve and refute explanations given. But this cannot be a good reason for omitting, from a hard-hitting article making serious allegations against a named individual, all mention of that person's own explanation.
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> ... By omitting Mr Reynolds' explanation English readers were left to suppose that, so far, Mr Reynolds had offered no explanation. Further, it is elementary fairness that, in the normal course, a serious charge should be accompanied by the gist of any explanation already given. An article which fails to do so faces an uphill task in claiming privilege if the allegation proves to be false and the unreported explanation proves to be true.
>
> Was the information in the Sunday Times article information the public was entitled to know? The subject matter was undoubtedly of public concern in this country. However, these serious allegations by the newspaper, presented as statements of fact but shorn of all mention of Mr Reynolds' considered explanation, were not information the public had a right to know. I agree with the Court of Appeal this was not a publication which should in the public interest be protected by privilege in the absence of proof of malice.

In this case, the impugned article was entirely based on the press statement of Chong Eng and had quoted extensively from it. Where the defendants are repeating what somebody else had told them, they are generally to be treated as having said it themselves. So the defendants here are to be treated as though they had themselves made the defamatory allegation against the plaintiff.

The allegations against the plaintiff were very serious. He is a professional musician and resident conductor of PESSOC and it was foreseeable that the allegations that he is not qualified to be the conductor and to teach other musical instruments besides violin, would have serious repercussions for him. In fact the plaintiff testified that the allegations spread very fast in music circles and that his son was told that his father was a criminal and that the number of his students had fallen drastically. The allegations were an attack on the plaintiff's character. The nature of the information was such that it only concerned a narrow section of the public involved with PESSOC namely the students and their parents. The information was not of concern to the general public. At that point in time when the impugned article was published on 24 June 1998, it was already more than two weeks after Chong Eng had raised matters relating to the plaintiff's qualifications and other alleged misconduct in the State Assembly. Kee had answered the allegations in the Assembly. Subsequently, she had issued a press statement on 16 June 1998 in which she had said that she had proof that the plaintiff's degree in music was genuine. The PESSOC Techical Committee had made a press statement on 14 June 1998 stating that the plaintiff's degree had been freshly certified by Leeds University. The plaintiff too had made a press statement on 16 June 1998, describing why he became the resident conductor of PESSOC, that a group of people strongly resented his presence, and he questioned why the supposedly 'responsible' person who raised the matter in the State Assembly, had not taken reasonable care to verify her 'suspicion' before raising the matter in the State Assembly and maintaining that he was able to obtain a faxed verification within two hours from Leeds University. So at the time of publication, all the allegations had been fully answered; but the defendants chose to make the renewed allegations. The article was hostile to the plaintiff. His side of the matter was no fairly put. In fact the whole article, taken as it was from Chong Eng's press statement, was one-sided and harsh towards the plaintiff.

Did The Defendants Verify The Truth Of The Statements

The defendants no doubt were content to rely on Chong Eng's press statement. But Chong Eng had her own agenda.

She was out to score against her political opponent Kee and sad to say was not concerned that the plaintiff was the real victim who had suffered from the consequences of her unfair and unjust allegations. In any case the 1st defendant admitted that he took no steps to verify the contents of Chong Eng's press statement.

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Assembly. Kee had answered the allegations in the Assembly. Subsequently, she had issued a press statement on 16 June 1998 in which she had said that she had proof that the plaintiff's degree in Music was genuine. The PESSOC Technical Committee had made a press statement on 14 June 1998 stating that the plaintiff's degree had been freshly certified by Leeds University. The plaintiff too had made a press statement on 16 June 1998, describing why he became the resident conductor of PESSOC, that a group of people strongly resented his presence and he questioned why the supposedly 'responsible' person who raised the matter in the State Assembly, had not taken reasonable care to verify her 'suspicion' before raising the matter in the State Assembly and contending that he was able to obtain a faxed verification within two hours from Leeds University. So at the time of publication, all the allegations had been fully answered but the defendants chose to make the renewed allegations.

From the evidence of Kee and PW2 the Chairman of the Joint Technical Committee of PESSOC, it is clear that the plaintiff's qualifications and experience as a conductor and teacher of young musicians were satisfactory and were acceptable to the Technical Committee of PESSOC. From the plaintiff's evidence-in-chief it can be seen that he had been a musician playing the violin, had been a musical director and teacher in England from 1982, when he obtained his degree in music, until 1994 when he came to Penang. Brief details of his work in Penang can be seen from the brochure entitled "Highlights of PESSOC Programs". Although he is qualified to teach the violin, he has been successfully teaching other instruments like the viola and cello and his students have been accepted by the Asian Youth Orchestra. The plaintiff's emotional stand in respect of the defendant's unfair publication on him is best narrated *verbatim*. He said in evidence:

> I am a musician and a conductor and any question, which tends to cast doubts about my qualifications and experience, as happened in this case, struck at the very core of my profession. My standing in the musical world was affected and led to disaffection among the members of the Orchestra and the music loving public. News of these allegations was quickly spread through the international Musical Community, even the person who is now the Choir Mistress of PESSOC, Ms. Khoo Hooi Lay heard the news in Germany. Subsequent musicians visiting Penang have been 'briefed' on my background and asked what they think. The Defendants were well aware of the repercussions the said words would have on me and nevertheless went ahead to publish them. For example, before the said words were published, I had about 15-20 students per week, to whom I had taught instruments privately, but after the publication of the said words and others before that, as I have stated earlier, the number of students fell to about 5-6 per week. This has been the position until recently, when a few more students have come to me. I would say the publication of the said words by the defendants exacerbated the already existing situation.

> Recently PESSOC were approached by Methodist Girls School to help train the orchestra. In a first interview with the Headmistress, Ms. Wong, she made it clear that she had been wanting to appoint a new trainer for the orchestra for some years, but had been worried about the newspaper stories printed about me. Only after 3 years was she prepared to reconsider, but I felt as if every movement I made, would be monitored.
>
> By the publication of the said words, the defendants had exacerbated the situation which already existed by the previous publication of the allegations made by Ms. Chong Eng in The Star and Kwong Wah Yit Poh. I continued to receive abusive telephone calls at all times of the day and night. I began to experience self-doubts and became uneasy in music circles. I could not sleep and my weight was affected. My son was very unhappy and suffered in going to school. Subsequently I took him out of school. I therefore say, that as a result of the publication of the said words, I have been injured in my credit and reputation as a music teacher and conductor and have been brought into public scandal, odium and contempt.

Having considered every issue raised I find that the defence of qualified privilege is not available to the defendants.

Fair Comment

In Tjanting Handicraft Sdn. Bhd. v. Utusan Melayu (M) Bhd [2001] 3 CLJ 571 when dealing with the defence of fair comment this is what I said at pp. 592-593:

> A comment is a statement of opinion based on facts. Therefore a libellous statement of fact cannot form the basis of a fair comment. In respect of fair comment O. 78 r. 3(2) of the RHC reads as follows:
>
> > Where in an action for libel or slander the defendant alleges that, in so far as the words complained of consist of statements of fact, they are true in substance and in fact, and in so far as they consist of expressions of opinion, they are fair comment on a matter of public interest, or pleads to the like effect, he must give particulars stating which of the words complained of he alleges are statements of fact and of the facts and matters he relies on in support of the allegation that the words are true.
>
> Whilst the defendants had given particulars of the facts on which they rely, yet they failed to comply with O. 78 r. 3(2) of the RHC in not stating 'which of the words complained of they allege are statements of facts and of the facts and matters they had relied on in support of the allegations that the words are true'. A defendant should not enter a plea of fair comment unless he is satisfied that the facts which are relied upon in support of the plea are true and that he has reasonable evidence to support them or reasonable grounds

in believing that he has sufficient evidence to prove them at the trial. In *McDonald's Corp & Anor v. Steel & Anor* [1995] 3 All ER 615 (CA), Neill LJ said at p. 622 as follows:

> It is to be remembered that the defences of justification and fair comment form part of the framework by which free speech is protected. It is therefore important that no unnecessary barriers to the use of these defences are erected, while at the same time the court is able to ensure that its processes are not abused by irresponsible and unsupported pleadings.

I am of the view that this view of mine can be similarly applied to the case before me. The defendants had clearly failed to comply with the requirement of O. 78 r. 3(2) of the Rules of the High Court 1980. In any case since the defendants had admitted that they never verified the truth or otherwise of Chong Eng's statement, surely the defendants now cannot avail themselves of the defence of fair comment.

It is trite law that if the facts stated in the publication as a basis for comment are themselves defamatory, the defendant must plead justification or privilege in relation to them, as fair comment will not be a defence.

Thus, in order to succeed in the defence of fair comment the defendants must show what are the words in the impugned article that are comment and those that are facts. Some of the allegations in the article are comments eg, that the plaintiff is not qualified to be a conductor, that he is not qualified to teach other musical instruments besides violin, that he has no experience in training young musicians, that he had assaulted students that he was giving lessons illegally and was a tax evader. These are allegations of fact, which must be proved by the defendants. The defendants must therefore prove the facts on which these comments are based.

To take the first question "Is a person who holds a general degree in music and a diploma in violin qualified to be a conductor?", the defendants here had meant to say that such a person as the plaintiff, is not qualified to be a conductor and the defendants must therefore prove the facts on which this statement is based. The evidence of Kee is that the plaintiff has extensive experience in conducting, and has had music education in England and that although there are degree courses in conducting, there are many musicians and composers who later in life became conductors and that they include many famous conductors who initially started their professional careers as pianists and violinists.

I am therefore convinced that the defendants had failed to establish the defence of fair comment.

I hold the view that in these days of investigative journalism the defendants cannot claim that they honestly believed in the truth of the impugned words when any information required could easily have been checked out. Since the press statement was given because of accusations by one politician against another, the defendants ought to have been all the more alert to verify the truth of the press statement and to ascertain from the plaintiff whether the information was reliable. The defendants omitted to take such steps because they did not care whether the matters relating to the plaintiff as contained in Chong Eng's press statement were true or not. In short the defendants were indifferent to the truth or otherwise of the statement.

Damages

It must be also noted that the defendants had refused to take any steps to remedy the damage caused to the plaintiff's reputation by offering to correct the error.

In *Abdul Khalid Bakar Shah v. Party Islam Se Malaysia & Ors* [2001] 4 CLJ 15, I said at p. 36 as follows:

> In awarding damages, the court must consider the circumstances attending the publication, the falsity of the words used, the malice contained in the publication, the mode of publication, the extent of the circulation of Harakah, the fact that the defendants deviated from their pleadings and the lack of an apology, and the denial and subsequent confirmation of the receipt of the letter demanding the apology.

In that case I awarded a sum of RM200,000 as damages. I am of the view that a similar sum ought to be awarded to the plaintiff in this case.

The plaintiff made no genuine effort to press for aggravated and exemplary damages as pleaded. The submission was totally devoid of any substance on these issues save for the plaintiff's desire for a further sum of RM100,000 under these head of damages. Since the court was not sufficiently addressed on these issues, I make no award under these heads. I also grant the plaintiff an injunction restraining the 1st defendant by himself, his servants or agents or otherwise and the 2nd defendant by its directors, its servants or agents or otherwise from further publishing the said or any similar libel upon the plaintiff.

The said sum of RM200,000 will attract interest at 4% p.a. from the date of publication namely 24 June 1998 to date of judgment and costs.